JUN 28 2010

No. 09-1442

In The
Supreme Court of the United States

DENALI, L.L.C. and AMERICAN BUSH, INC.,

Petitioners,

v.

UTAH STATE TAX COMMISSION, et al.,

Respondents

On Petition For A Writ Of Certiorari To The Utah Supreme Court

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF CLUB EXECUTIVES, INC., IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE A BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Amicus Curiae Association of Club Executives, Inc. ("ACE," or "ACE National"), hereby respectfully moves for leave to file the attached brief *Amicus Curiae* in this case. The consent of the attorney for Petitioners has been obtained; the consent of the attorney for Respondents was requested but has not been obtained.

ACE is a Florida "501(c)(6)" non-profit corporation that is the national trade association for the exotic dance nightclub industry. Among other things, ACE assists in the forming of affiliate state chapters. ACE National and its affiliated state chapters have been established, in part, to protect adult cabaret nightclubs from legislation meant to suppress this form of entertainment.

The membership of ACE National is comprised of approximately 1,492 exotic dance clubs, including Deja Vu Showgirls of Las Vegas, LLC (d/b/a Deja Vu Showgirls), Little Darlings of Las Vegas, LLC (d/b/a Little Darlings), SHAC, LLC (d/b/a Sapphire), K-Kel, Inc. (d/b/a Spearmint Rhino Gentlemen's Club), D.I. Food & Beverage of Las Vegas, LLC (d/b/a Scores), and The Power Company, Inc. (d/b/a Crazy Horse Too Gentlemen's Club) (collectively, the "Nevada ACE Clubs"). These particular clubs are plaintiffs in lawsuits challenging a Nevada tax similar to the one

at issue in the case brought by Petitioners Denali, L.L.C., and American Bush, Inc., in Utah.

Amicus ACE seeks to file this brief as a representative for the Nevada ACE Clubs, and on behalf of its other members which are now (or may be in the near future) facing similar types of draconian taxes directed specifically against controversial, unpopular, or disfavored – but nonetheless constitutionally protected – speech and expression. These businesses, their ability to present their desired form of constitutionally protected entertainment, and the public's right to view such expression, may be significantly curtailed unless this Honorable Court grants the Petition in this matter. In addition, ACE's members, and in particular the Nevada ACE Clubs, will be significantly affected by any ruling of this Court in regard to the filed Petition, including the denial thereof which could be taken by the inferior courts around the country, including the Nevada court currently addressing the claims of the Nevada ACE Clubs, as tacit acknowledgement that the new, unique, and potentially dangerous analysis adopted by the Utah Supreme Court is acceptable under First Amendment jurisprudence.

Amicus believes that the Utah State Supreme Court decision in this action will result in significant infringement upon the exercise of protected expression, and should be immediately addressed by this Honorable Court. The analysis utilized therein appears to be in direct contravention to the jurisprudence of this Court involving the constitutionality of

tax laws directed at First Amendment activities, and adopts a watered-down level of constitutional scrutiny (not seen in any other case throughout the country) that will invariably lead to the enactment of other tax laws specifically directed at controversial, unpopular, or disfavored expression, and to, as a consequence thereof, the infringement of First Amendment protected activities.

Wherefore, *Amicus* Association of Club Executives, Inc., respectfully requests that this motion for leave to file the attached brief, *amicus curiae*, be granted.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Association of Club Executives, Inc. ("ACE," or "ACE National"), is a Florida "501(c)(6)" non-profit corporation that is the national trade association for the exotic dance nightclub industry. Among other things, ACE assists in the forming of affiliate state chapters. ACE National and its affiliated state chapters have been established, in part, to protect adult cabaret nightclubs from legislation meant to suppress this form of entertainment.

The membership of ACE National is comprised of approximately 1,492 adult cabaret nightclubs, including Deja Vu Showgirls of Las Vegas, LLC (d/b/a Deja Vu Showgirls); Little Darlings of Las Vegas, LLC (d/b/a Little Darlings); SHAC, LLC (d/b/a Sapphire); K-Kel, Inc. (d/b/a Spearmint Rhino Gentlemen's Club); D.I. Food & Beverage of Las Vegas, LLC (d/b/a Scores); and The Power Company, Inc. (d/b/a Crazy Horse Too Gentlemen's Club) (collectively, the "Nevada ACE Clubs"). For the sake of simplicity,

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[1] Pursuant to Sup. Ct. R 37.6, counsel for *Amicus Curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *Amicus* made a monetary contribution to the preparation and submission of this brief. Written consent of Petitioners to the filing of this brief has been filed with the Clerk pursuant to Sup. Ct. R 37.2(a). The parties were notified at least ten days prior to the filing of this brief, that *Amicus Curiae* intended to submit a brief in support of review. Respondents did not give their consent.

these businesses are referred to herein as the "Nevada ACE Clubs."

The Nevada ACE Clubs are plaintiffs in lawsuits challenging a Nevada tax similar to the one at issue in the case brought by Petitioners Denali, L.L.C., and American Bush, Inc., in Utah. ACE is filing this brief as a representative for the Nevada ACE Clubs and on behalf of its other members, which are now – or which may be in the near future – facing similar types of draconian taxes directed specifically against controversial, unpopular, or disfavored, but nonetheless constitutionally protected, speech and expression. These businesses, their ability to present their desired form of constitutionally protected entertainment, and the public's right to view such expression, may be significantly curtailed unless this Honorable Court grants the Petition here.

SUMMARY OF ARGUMENT

Under the Tax Injunction Act, 28 U.S.C. § 1341, and the interpretive jurisprudence regarding that statute by this Honorable Court, it is virtually impossible for a person or business entity faced with a content-based state tax, directly targeting expression protected by the First Amendment, to seek and obtain redress in the federal courts. Rather, this Court has directed that those aggrieved must look to state remedies that may be administratively, or judicially, available, but where challengers may be

subject to state administrators and judges who may be unsympathetic to the federal rights at issue, and who may be subject to political and institutional pressures (from which life-tenured federal judges are insulated)[3] to uphold these types of targeted taxes, to thereby protect the revenue stream of state tax dollars, and to placate the rest of the citizenry whose own taxes would not then have to increase accordingly.

However, the avenues of state redress are uncertain, they are not necessarily – as demonstrated by the experience of the Nevada ACE Clubs – either speedy or expeditious, and they are pitted with procedural hurdles and roadblocks that may make it difficult, if not impossible, to fully and adequately protect the sensitive First Amendment rights at stake.

In fact, some of these state taxation statutes specifically *preclude* the entry by a state court of an injunction or other legal order prohibiting the collection of the tax (as is the case regarding the Nevada ACE Clubs), *even if the court were to find that there was a substantial likelihood that the tax was unconstitutional*. Such a statute basically ensures that no judicial relief is available to preclude First Amendment rights from being irreparably harmed.

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[3] *See, e.g., Kaufman v. United States*, 394 U.S. 217, 225-226 (1969); and *Butler v. McKellar*, 494 U.S. 407, 427 n.8 (1990) (Brennan, J., dissenting).

Because of the jurisdictional impediments to federal courts presented by the Tax Injunction Act, because state remedies are not truly "speedy," because state redress may not be able to preclude the incurrence of irreparable harm to the engagement of First Amendment activities, because these types of targeted taxes are popping up throughout the country as a result of the current economic climate yet appear to directly conflict with the First Amendment jurisprudence of this Honorable Court, and because the Utah Supreme Court has charted out new and dangerous ground in invoking the "secondary effects" doctrine as a way to justify the enactment of tax laws that would otherwise be invalidated under the existing precedent of this Court, *Amicus* asserts that the Petition should be granted.

REASONS FOR GRANTING THE PETITION

As this Court has stated, the power to tax the exercise of a constitutional right "is the power to control or suppress its enjoyment." *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 112 (1943). With the current economic climate – where virtually every governmental unit is in financial distress – those engaged in controversial, unpopular, or disfavored speech/expression, and who do not then possess the political clout to derail the enactment of abusive legislation, have become easy targets for the imposition of significant, and in some circumstances draconian, taxes directly targeted at such activities.

The taxes at issue in the Petition, and as faced by a number of *Amicus'* members, are just such examples.

In light of the admonition in *Murdock*, it is important to note that, as this Court has recognized on numerous occasions, the infringement of First Amendment rights, even for a minimal period of time, unquestionably constitutes irreparable harm so as to *otherwise* justify the entry of preliminary injunctive relief. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976). And, the imposition of the types of taxes at issue here can create such injury. *See, e.g., Joelner v. Village of Washington Park, Illinois*, 378 F.3d 613, 620, 628 (7th Cir. 2004) (court found that if plaintiff could not afford the "hefty" licensing fee required, "he would be forced to shut down his bookstore. Hence, there is a threat that these allegedly unconstitutionally excessive fees could cause Joelner significant irreparable harm").

Yet, as will be discussed below, many state taxation statutes, including the one challenged by the Nevada ACE Clubs, contain provisions that specifically preclude state courts from enjoining the collection of the tax, *even if the taxation provisions are blatantly unconstitutional*. Consequently, a litigant challenging a content-based tax, directly targeted at protected expression, may be unable to obtain timely and effective judicial relief to ensure that the engagement in First Amendment activities is not, in fact, irreparably harmed. It is, therefore, critical that the legislative branches of government and the inferior courts (particularly the *state* courts, where

most of these challenges will occur in light of the preclusive effect of the Tax Injunction Act; 28 U.S.C. § 1341) have clear guidance from this Court as to the standards to apply when evaluating the constitutionality of such taxes so that important First Amendment rights are not further sacrificed. The Petition should be granted.

I. THE TAX INJUNCTION ACT, 28 U.S.C. § 1341, AND STATE PROCEDURAL HURDLES MAKE IT EXTREMELY DIFFICULT, IF NOT IMPOSSIBLE, TO MOUNT A TIMELY AND EFFECTIVE JUDICIAL CHALLENGE TO THESE TYPES OF CONTENT-BASED TAXES; THEREFORE WARRANTING THIS COURT GRANTING THE PETITION IN ORDER TO PROVIDE PROPER AND TIMELY GUIDANCE TO BOTH THE LEGISLATIVE BRANCHES OF GOVERNMENT AND TO THE LOWER COURTS IN EVALUATING THE CONSTITUTIONALITY OF THESE NEW FORMS OF TAXES SPECIFICALLY DIRECTED AGAINST PROTECTED EXPRESSION.

Petitioners brought to this Court's attention the increasing frequency with which taxes upon the presentation of constitutionally protected erotic expression have been imposed throughout the country. Petition, pp. 14-16. The Nevada ACE Clubs are facing just such a content-based tax, and their experience in attempting to challenge that statute demonstrates the need for this Court to grant the Petition and to

provide clear direction as to the constitutionality of these increasingly popular taxes.

A. The Nevada Live Entertainment Tax.

On July 22, 2003, Nevada enacted Chapter 368A of the Revised Statutes, which imposes, subject to numerous and various exceptions discussed below, an excise tax on admission to any facility that provides defined "live entertainment" (hereinafter, "Chapter 368A," or the "Live Entertainment Tax," or simply the "LET"). As originally adopted, the tax imposed by Chapter 368A was not applicable, under the terms of NRS § 368A.200(5)(d), to live entertainment in a non-gaming[3] establishment if the facility in which the live entertainment was provided had a maximum occupancy of less than 300 persons.

On June 17, 2005, however, Chapter 368A was amended to reduce the scope of the NRS § 368A.200(5)(d) exemption from a maximum seating capacity of 300 down to 200. The purpose of this amendment was to specifically extend the LET to a number of adult entertainment nightclubs that were not then subject to the tax.[4] Relevant excerpts of the

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[3] The LET is administered in two different fashions; one for licensed gaming (legalized gambling) establishments, and the other for non-gaming places of business.

[4] The legislative history unequivocally bears this out, by noting one Senator observing that the 2005 amendments to the statute were necessary because the original 2003 Bill "didn't adequately bring in a group some of us intended to be covered,

(Continued on following page)

current codified version of Chapter 368A, incorporating the 2005 amendments, are attached hereto at App. 24-36.

While purporting to apply to virtually any form of live entertainment (*see* NRS 368A.090) (App. 25), the LET is gerrymandered in such a fashion so that the non-gaming aspects of the tax apply to adult nightclubs and little else. Exemptions to the taxes are contained in NRS 368A.200(5) (App. 30-32), and preclude the taxing of, among other things:

- Live entertainment by tax-exempt or non-profit organizations;
- Boxing contests;
- Live entertainment at trade shows;
- Music performed by musicians who move constantly through an audience;

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which are the striptease clubs that have proliferated, particularly in southern Nevada." App. 38. In that same hearing, the Chairwoman commented that the state was getting "the most revenue from adult entertainment clubs, which is $6 million dollars, the highest amount paid under the live entertainment tax." App. 41. While she further stated that "everything else pales in comparison" to how much the "adult entertainment clubs" were bringing in under the LET, she observed that the next highest amount was the "race tracks," that were at $1.5 million. *Id.* However, this legislative history also explains that NASCAR racing and other sporting events were then being *exempted* from the tax because they were believed by the legislators to be "*family oriented*." App 42.

- Live entertainment at private meetings or dinners in licensed gaming establishments;
- Live entertainment provided in the common areas of shopping malls;
- Food and product demonstrations;
- Live entertainment that is incidental to an amusement ride, motion simulator or similar digital, electronic mechanical attraction;
- Live entertainment that is provided to the public in an outdoor area if no admission fee is charged;
- Any outdoor concert (thereby negating the admission fee restriction of the previous exemption);
- NASCAR or associated race events;
- Minor league baseball events; and
- "Incidental" live entertainment provided in a restaurant which only serves as *ambiance*.

Those are not, however, all the exemptions. The definition of "live entertainment" under NRS 368A.090(b) (App. 26-28) excludes:

- Instrumental or vocal music in a restaurant, lounge or similar area that does not interfere with casual conversations;

- Unadvertised occasional performances by employees who prepare, sell or serve food or beverages to patrons;
- Performances at certain licensees gaming establishments where the "performers stroll continuously throughout the facility";
- Performances in licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables";
- Broadcasts of live entertainment;
- Entertainment provided by patrons;
- Animal behaviors for scientific and education research purposes; and
- Occasional, unadvertised, activity (including dancing) that primarily "serves to provide ambience," is conducted by an employee whose primary job function is not that of an entertainer, and "does not constitute a performance."

In addition, even the *amount* of the tax is not consistently assessed. There is a higher rate of tax for establishments with a seating capacity of less than 7,500 persons (*i.e.*, the non-casinos), than for facilities over that number. NRS 368A.200(1) (App. 28-29).

No suit may be filed to recover taxes alleged to have been erroneously or illegally collected unless an administrative claim for refund has been filed. NRS 368A.280(2) (App. 35). In addition, the statute holds that "*[n]o injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.*" NRS 368A.280(1) (App. 34-35) (emphasis added). This Court has noted that these types of judicial redress restrictions are "common practice" in state tax statutes. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 523 (1981) (quoting S. Rep. No. 1035, 75th Cong., 1st Sess., 1 (1937)).

B. The Nevada Proceedings.

Because the LET is specifically directed at activities protected by the First Amendment and appears to violate all three constitutional precepts as established by this Court for the invalidation of a tax directed at protected expression (*see* Section III, *infra*), the Nevada ACE Clubs filed suit in federal district court in Las Vegas in April of 2006, challenging its constitutionality (the "Federal Case"). The Department of Taxation filed a motion to dismiss, claiming that the Tax Injunction Act (28 U.S.C. § 1341) precluded the lawsuit because the Nevada court and administrative systems provided, in the words of the statute, a "plain, speedy and efficient

remedy" to challenge the LET. The district court granted that motion and dismissed the case (App. 11-19), and the Ninth Circuit affirmed in a three-paragraph ruling made without oral argument. App. 1-2.

As a result of the district court's dismissal of the Federal Case, in December of 2006, the Nevada ACE Clubs filed a similar offensive lawsuit in Nevada state court ("First Nevada State Case"). This suit, like the Federal Case, requested an injunction to prohibit the collection of the tax that plaintiffs there contended was blatantly unconstitutional.[5] In addition, because of the statutory provisions of Chapter 368A, a number of the Nevada ACE Clubs were then required to undertake the state administrative refund process as a predicate for the filing of a *refund suit* in state court.

After filing their first set of administrative requests for refund to the Nevada Department of Taxation ("Department"), all of which were denied, those

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[5] Injunctive relief was requested irrespective of the provisions of NRS 368A.280(1) (which statutorily prohibited any injunction or other court order preventing the collection of the LET), as the Nevada ACE Clubs asserted that such a statutory prohibition was, itself, unconstitutional as a violation of the separation of powers among the branches of government. *See, e.g., City of Norwood v Horney*, 853 N.E.2d 1115, 1122, 1148-1150 (Ohio 2006); and Nevada Const. Art. 6, § 6 (which states. " . . . The District Courts and the Judges thereof have power to issue writs of . . . Injunction . . , and all other writs proper and necessary to the complete exercise of their jurisdiction").

entities appealed to the Nevada Tax Commission ("Commission"), which began hearing the appeals on July 9, 2007. At that initial hearing, the Department, through legal counsel, stated that it was

> important to mention NAC 368A.170 which requires that if it is determined that a refund is appropriate in this case, *that the taxpayer would first have to establish that any amounts of the refund could be or have been actually refunded to the patrons of the taxpayer, and there has been no indication in this case that there is any ability of the taxpayer to refund that money to the patrons.*

Transcript, July 9, 2007, p. 30 (emphasis added). App. 7.

NAC 368A.170 (App. 23-24) concerns the "over-collection" of taxes (defined, in part, as "any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of NRS 368A.200" – NAC 368A.170(1) (App. 23)), and states that any over-collection "must, if possible, be refunded by the taxpayer to the patron from whom it was collected." NAC 368A.170(2) (App. 23). The taxpayer is required to use "all practical methods to determine any amount to be refunded pursuant to subsection 2 and the name and address of the person to whom the refund is to be made." NAC 368A.170(3)(a) (App. 23).

When the hearing was continued on August 6, 2007, counsel for the appellants (the undersigned) addressed the State's NAC 368A.170 argument:

> . . . [W]hat the Department would say is that if a customer buys Coca-Cola, for us to get a refund of this tax, we have to get the name and address of every person buying a Coca-Cola or a beer coming in the facility and I don't think any of you in your real life experiences have ever had any time where you went to buy food and drink and had to give your name and address, and that doesn't happen here.

Transcript, August 6, 2007, p. 10 (App. 4).

The undersigned further informed the Commission that the taxes were paid not by the patrons but, rather, by the clubs themselves, and submitted affidavits from four of the Nevada ACE Clubs establishing that "none of the facilities have raised their admission fees in order to recoup the tax, the tax merely is deducted out of the general receipts of the business and it's the businesses' money that we're trying to get back." Transcript, August 6, 2007, pp. 10-11 (App. 4).

Despite these and other arguments, the Commission upheld the refund request denials. Thereafter, pursuant to NRS 368A.280(2) and 368A.290, those appellants filed suit in state court seeking a judicial determination on their claim for refund (the "Second State Case"). That action was assigned to the same judge handling the First State Case.

On June 5, 2008, the Nevada ACE Clubs, being the plaintiffs in the First State Case, filed a motion for preliminary injunction, which was argued on July

31, 2008. *That motion has yet to be decided by the state trial court.*[6]

These delays are of absolutely no concern to the Nevada government. In their motion to dismiss the Federal Deja Vu Case, the state contended that it was not necessary to afford those plaintiffs *any* judicial redress to either declare the LET unconstitutional, or to enjoin its enforcement, stating: "The foregoing provision [NRS 368A.280(1)] has not yet been construed by the Nevada Supreme Court. Even were it construed to prohibit every remedy other than the refund procedures allowed under NRS 368A.250-.320, *the refund procedures are adequate. There is no requirement that taxpayers be afforded more than that.*" *Motion to Dismiss*, p. 8 (emphasis and clarification added). App. 21. Even in the federal appeal, the State of Nevada took the position that the aggrieved taxpayer was merely entitled to the administrative review process to obtain a tax refund. Appellees' Answering Brief, p. 13 (App. 9-10).

C. These Events Demonstrate why Review by this Court of this Area of First Amendment Jurisprudence is Warranted.

Under the Tax Injunction Act, federal jurisdiction to enjoin an unconstitutional state tax statute – even

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[6] The defendants to that action also filed, at approximately the same time, a motion to dismiss the First State Case, and later a motion for summary judgment. Those motions, also, have yet to be ruled upon by the state trial court.

one directly impacting upon First Amendment rights – does not apply when there is a "plain, speedy and efficient remedy . . . in the courts of that state." 28 U.S.C. § 1341. That state remedy has to be "swift and certain." *Hibbs v. Winn*, 542 U.S. 88, 108 n.10 (2004). The federal district court in Las Vegas and the Ninth Circuit both held that such a "swift and certain" state remedy existed under the laws of Nevada.

Yet, here, the First State Case was filed in December 2006, the administrative process began in February 2007, and a second lawsuit was filed in January 2008 to judicially appeal the Commission's denial of the first set of requests for refund of the taxes paid. To date, however, no resolution has occurred (again, the state trial court has not yet even ruled on the Nevada ACE Clubs' motion for preliminary injunction filed in *June of 2008*), and the Department continues to deny each and every request for refund filed on a monthly basis.

The Nevada ACE Clubs are now approaching the *fourth* anniversary of the filing of the First State Case (and well over four years since the filing of their initial federal court action), and they must continue to pay oppressive taxes that they contend are blatantly unconstitutional under the First Amendment jurisprudence of this Honorable Court. Moreover, even if the clubs prevail in their state court proceedings and the LET is found to be illegal, the Nevada ACE Clubs will be confronted with NAC § 368A.170 (the clubs needing the name and address of every patron who purchased admission, food, drink

or merchandise in order to be able to remit the refund back to them) in their attempts to be reimbursed for the taxes paid, and may be precluded from obtaining tax refunds for the illegally paid taxes *even if the tax is judicially determined to be flagrantly unconstitutional*. The longer it takes for this Court to address these issues, the more potentially unconstitutional taxes are paid that the Nevada ACE Clubs and others may never be able to recoup.

As *Amicus* has described, their state proceedings have not been speedy, they have not been efficient, and any recovery is far from certain even if the Live Entertainment Tax is found to be unconstitutional. As more of these types of taxes are enacted, litigants challenging such laws will face the same types of state procedural hurdles as have confronted the Nevada ACE Clubs. Unless this Court grants the Petition, scores of individuals and businesses engaged in the presentation of First Amendment protected expression will continue to have to pay draconian taxes pursuant to statutory schemes that may well violate the First Amendment, potentially leading to financial ruin and the cessation of the engagement in protected expression.

For these reasons, *Amicus* respectfully requests that the Petition for a Writ of Certiorari be granted so that this Court may provide clear guidance on these critical matters of First Amendment jurisprudence.

II. THE TYPE OF TAXES AT ISSUE HERE ARE NOT SUBJECT TO THE POLITICAL RESTRAINTS, RECOGNIZED BY THIS COURT, WHICH ENSURE THAT UNCONSTITUTIONAL TAXATION LAWS ARE NOT ENACTED; THEREBY WARRANTING PROMPT REVIEW BY THIS HONORABLE COURT.

What is clear in both the Utah and Nevada statutes is that these are not generally applicable, "across-the-board," taxes. As this Court noted in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983):

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. *When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.*

Id. at 585 (emphasis added).

This Court summarized these political constraints as follows:

> We noted that the general applicability of any burdensome tax law helps to ensure that it will be met with widespread opposition. When such a law applies only to a single

> constituency, however, it is insulated from this political constraint.

Leathers v. Medlock, 499 U.S. 439, 445 (1991).

The potential enactment of the type of taxes at issue here, specifically directed, or legislatively gerrymandered, to apply only, or primarily, to controversial, unpopular, or disfavored speech/expression, is simply not circumscribed by the type of political counterweights noted by this Court in *Minneapolis Star* and *Leathers*. Because of the political ease of enacting these types of significant (and most likely unconstitutional) taxes upon the engagement of controversial, unpopular, or disfavored expression, the present political and economic climate (where virtually every state and municipality is underfunded and seeking ways to increase revenues – *i.e.*, raise taxes – in a fashion that will not peak the political ire of the general electorate), and the inability to seek and obtain prompt judicial redress through the federal courts to challenge such laws, this Court should grant the Petition in order to provide prompt direction on the jurisprudential standards to impose when evaluating the constitutionality of such taxes.

III. REVIEW IS NECESSARY TO LIMIT THE EXPANSION OF UTILIZING INTERMEDIATE SCRUTINY UNDER THE "SECONDARY EFFECTS" DOCTRINE IN ORDER TO JUSTIFY CONTENT-SPECIFIC TAXES THAT OTHERWISE VIOLATE THE FIRST AMENDMENT.

There are three ways that a tax may violate the First Amendment. First, a direct tax specifically on First Amendment freedoms is unconstitutional. *Murdock*, 319 U.S. at 108 ("[I]t could hardly be denied that a tax laid *specifically on the exercise* of those freedoms would be unconstitutional") (emphasis added). Second, a tax that targets a narrowly defined group of speakers is unconstitutional. *Leathers*, 499 U.S. at 447-448 ("A tax is also suspect if it targets a small group of speakers" as it "runs the risk of affecting only a limited range of views"). *Leathers*, 499 U.S. at 447-448. Third, a content-based tax is unconstitutional. *Leathers*, 499 U.S. at 447 ("Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech").

Possibly for the first time in the annals of American jurisprudence, the Utah Supreme Court has sustained a targeted tax upon First Amendment expression that violates *all three* of the fundamental precepts set forth by this Court above, on the ground that the tax statute satisfied the intermediate scrutiny test of *United States v. O'Brien*, 391 U.S. 367

(1968), based upon the justification of the "adverse secondary effects" of adult entertainment. While *Amicus* will not reiterate the cogent arguments of the Petitioners in this regard, it does desire to expand upon some of those comments, particularly in regard to Justice Kennedy's controlling opinion in the fractured decision of *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (plurality),[7] and to respectfully illustrate to this Court the proverbial slippery slope down which the Utah Supreme Court has stepped.

First, Utah's attempt to justify its tax based upon the "adverse secondary effects" of adult entertainment has no support in the jurisprudence of this Court. Specifically, Justice Kennedy stated in his critical *Alameda Books* concurring opinion that: "A city may not regulate the secondary effects of speech by suppressing the speech itself. *A city may not, for example impose a content-based fee or tax. . . . This is true even if the government purports to justify the fee*

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[7] Under *Marks v. United States*, 430 U.S. 188 (1977), the Circuits have generally held that Justice Kennedy's concurring opinion represents the constitutional "holding" of the Court's plurality decision in *Alameda Books*, regardless of the type of legislation at issue. *See, e.g., 729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, at 491 (6th Cir. 2008); *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 465 (7th Cir. 2009); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 861-862 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003); and *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1269 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004).

by reference to secondary effects." *Id.* at 445 (emphasis added, citations omitted).[8]

Second, the reason that this secondary effects doctrine has no support from this Court in justifying the enactment of a targeted tax is because such application basically eviscerates the *O'Brien* test. Those standards require courts to examine, among other things, whether "the regulation *furthers* an important or substantial governmental interest," and whether the "*incidental restriction* on alleged First Amendment freedoms is no greater than is *essential* to the furtherance of that interest." 391 U.S. at 377 (emphasis added). Specifically, the challenged regulation must advance the governmental interest "in a direct and effective way. . . ." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

The government's burden to establish this fact is not satisfied by "mere speculation or conjecture," and the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a *material degree*." *Edenfield v.*

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[8] *Accord, id* at 450 ("This reasoning would as easily justify a content-based tax: Increased prices will reduce demand, and fewer customers will mean fewer secondary effects. *But a content-based tax may not be justified in this manner*") (Kennedy, J., concurring) (emphasis added); and *id* at 451 ("It is true that cutting adult speech in half would probably reduce secondary effects proportionally. But again, a promised proportional reduction does not suffice. *Content-based taxes could achieve that*, yet these are *impermissible*") (Kennedy, J., concurring) (emphasis added).

Fane, 507 U.S. 761, 762, 770 (1993) (emphasis added). Succinctly put, a court must be presented with a legislative record which sufficiently contains evidence "as to *how effective or ineffective*" the regulation is or might prove to be in order to ensure that the legislation does not sacrifice important First Amendment interests "for too 'speculative a gain.'" *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 760 (1996) (emphasis added) (quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 127 (1973)).

But a tax does not "*further*" the interest of ameliorating adverse secondary effects, nor is it "essential" to that goal. Quite simply, it does not satisfy *any* of these constitutional precepts. Rather, these types of targeted taxes are an after-the-fact *penalty* for the engagement in protected expression that some find to be distasteful.

Moreover, the array of regulations that the jurisprudence of this Court has permitted in order to address adverse secondary effects (zoning restrictions, nudity prohibitions, hours-of-operation restrictions, and the like) are all justified on the basis, through application of *O'Brien*, that they will have the effect of eliminating any adverse secondary effects that may have existed in the past. And, these types of restrictions are now widely enacted throughout Utah and, indeed, the rest of the United States. Yet, even though other type of regulations are in place to address adverse secondary effects, the Utah Supreme

Court permitted, without even analyzing this circumstance, a tax upon protected expression based on the presumption that these concerns still existed (if, in fact, they were ever present in the past).

Again, reference to Justice Kennedy's concurring opinion in *Alameda Books* points out the constitutionally flawed nature of the Utah Supreme Court's analysis in this regard. Justice Kennedy noted that regulations may constitutionally be utilized to reduce secondary effects, but they cannot have the consequent effect of also reducing expression-related activities.[9] This has become known as the "proportionality test" of *Alameda Books*. The Utah tax would seem to be the quintessential violation of this concept, as the tax itself cannot, in any regard, rectify or even reduce any "adverse secondary effects." Yet, imposing a financial disincentive to the engagement of protected expression (through a tax)

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[9] *Alameda*, 535 U.S. at 445 ("a city may not regulate the secondary effects of speech by suppressing the speech itself") (Kennedy, J., concurring). Specifically, Justice Kennedy observed that a regulation can be consistent with the First Amendment "if it is *likely* to cause a *significant decrease* in secondary effects and a *trivial decrease* in the quantity of speech," *id.* at 445 (Kennedy, J., concurring) (emphasis added), and summed up his analysis as follows: "A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with [the four Justice dissent authored by] Justice SOUTER *See, post*, at 1746. The rationale of the ordinance must be that it will suppress secondary effects – and not by suppressing speech." *Id.* at 449-450 (Kennedy, J., concurring) (clarification added).

can certainly result in the reduction of expression-related activities. *See Joelner*, 378 F.3d at 627-628.

Two recent developments in the lower courts further make the point that tax laws simply do not fit within the types of regulations that can logically be subject to the secondary effects doctrine. In engrafting Justice Kennedy's proportionality test onto a state constitutional analysis, the Arizona Supreme Court in *Arizona v. Stummer*, 194 P.3d 1043 (Az. 2008), noted that "the State must show [observing that the burden is upon the government in this regard] that, in addressing the secondary effects, the regulation does not sweep too broadly." 194 P.3d at 1050 (clarification added). In words taken almost verbatim from Justice Kennedy's *Alameda Books* opinion, that court stated that it "must examine whether the regulation protects substantial government interests *and whether it significantly reduces secondary effects without unduly interfering with protected speech*. . . . For the regulation to survive, its proponent must show . . . that the regulation significantly furthers [the substantial governmental] interest, and that the challenged regulation does not unduly burden speech." *Id.* at 1050-1051 (clarification added). *No tax law does this.*

Additionally, the Seventh Circuit recently issued a pair of decisions authored by the esteemed Judge Frank Easterbrook regarding – in light of Justice Kennedy's concurring opinion in *Alameda Books* – the government's burden to establish the secondary effects justification for the enactment of a law that

impacts upon protected expression. *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009); and *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556 (7th Cir. 2009). In *Annex Books*, Judge Easterbrook, for a unanimous court, noted that "the public benefits of the restrictions must be established by evidence, and not just asserted. . . . [T]here must be *evidence*; lawyer's talk is insufficient." 581 F.3d at 463 (emphasis in original). And, two weeks ago, this Court declined to review the Petition for Writ of Certiorari in *New Albany DVD*, *cert. denied*, ___ U.S. ___, 2010 WL 752359 (U.S. June 14, 2010). No content-based targeted tax could be upheld in the Seventh Circuit under this type of analysis, even assuming the propriety of applying the secondary effects doctrine to such a constitutional challenge.

Should the decision of the Utah Supreme Court not be reviewed, it will establish a dangerous precedent that will be used across the country to radically expand the secondary effects doctrine far beyond the current constitutional constraints and parameters set by this Court, permitting the unbridled enactment of virtually any tax on protected expression. In order to ensure the continued application of the Court's current First Amendment taxation jurisprudence, the Petition should be granted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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